



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Dyneteria, Inc.

File: B-222581.3

Date: January 8, 1987

DIGEST

1. Office of Management and Budget Circular (OMB) A-76 does not preclude a protest to the General Accounting Office (GAO) from an agency's administrative review of a bidder's appeal of the agency's in-house cost estimate.
2. GAO will decline to review an allegation that a particular aspect of a contracting agency's cost comparison was incorrect if the protester failed to raise the objection in an appeal to the agency.
3. OMB Circular A-76 cost comparison guidelines concerning the number of contract administrators whose cost is to be included in the cost of contract performance also provide for waiver of the recommended levels. Where the contracting activity has obtained a proper waiver, the protester's disagreement with the number of contract administrators required does not provide a basis for overturning the waiver.

DECISION

Dyneteria, Inc. protests the Department of the Navy's determination to retain in-house the Operation, Maintenance and Repair of Facilities, Equipment and Systems at the Public Works Center, at Pearl Harbor, Oahu, Hawaii. This determination, made in accordance with Office of Management and Budget (OMB) Circular A-76 procedures, was based on a comparison of Dyneteria's bid submitted in response to invitation for bids (IFB) No. N62471-85-B-2509, with the Navy's cost estimate.

The cost comparison showed that continuing in-house performance would cost the government \$1,509,803 less than contracting with Dyneteria. In response to Dyneteria's appeal to the Navy, the Navy adjusted the cost comparison by \$68,150, concluding that in-house performance would cost \$1,441,653 less than contracting with Dyneteria. Dyneteria contends that the Navy's cost comparison is erroneous in

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numerous respects, and asserts that a correct comparison would result in a change of \$3,518,139 in Dyneteria's favor (\$68,150 of which has already been allowed by the Navy), which warrants the reversal of the determination to retain in-house performance. We disagree and deny the protest.

Initially, we note that while the Navy has provided backup materials, it has not submitted a substantive report addressing the issues raised by Dyneteria. Rather, the Naval Facilities Engineering Command (NAVFAC) asserts that our Office lacks jurisdiction to consider protests concerning cost comparisons undertaken pursuant to OMB Circular A-76, and that even if we did have jurisdiction, NAVFAC would be precluded from implementing any corrective action recommendation issued by our Office. NAVFAC has raised these same arguments previously and they have been considered at length and rejected by our Office in prior protests. See, e.g., Contract Services Co., Inc., B-219430, Oct. 28, 1985, 65 Comp. Gen. _____, 85-2 C.P.D. ¶ 472; Trend Western Technical Corp., B-221352, May 6, 1986, 86-1 C.P.D. ¶ 437, aff'd on reconsideration, Trend Western Technical Corp.--Request for Reconsideration, B-221352.2, July 9, 1986, 86-2 C.P.D. ¶ 47; Alliance Properties, Inc., B-217544, Oct. 16, 1985, 85-2 C.P.D. ¶ 413, aff'd on reconsideration, Department of the Navy--Request for Reconsideration, B-220991.2, Dec. 30, 1985, 85-2 C.P.D. ¶ 728.

As we indicated in those cases, we recognize that the underlying determination involved in cost comparisons--whether work should be performed in-house by government personnel or performed by a contractor--is one which is a matter of executive branch policy and not within our protest function. However, where a contracting agency utilizes the procurement system to aid in its determination of whether to contract out, a protest from a bidder alleging that the bid has been arbitrarily rejected will be considered by our Office. In such cases, we do not believe that OMB Circular A-76, insofar as it precludes further administrative review, can be interpreted to preclude an appeal to our Office. On the contrary, we will review such protests to determine if the agency conducted the cost comparison in accordance with applicable procedures. Alliance Properties, Inc., B-217544, supra. To succeed in its protest, however, a protester must demonstrate not only that the agency failed to follow established procedures, but also that this failure could have materially affected the outcome of the cost comparison. Dwain Fletcher Co., B-219580, Sept. 27, 1985, 85-2 C.P.D. ¶ 348.

With respect to NAVFAC's argument that it would be precluded from implementing any corrective action recommendation by our Office, we have explicitly held that the Supplement to OMB Circular A-76, Part I, Ch. 2, Para. I, and the implementing regulation, Federal Acquisition Regulation (FAR) ¶ 7.307(b) (FAC 84-21, Aug. 29, 1986), cited by NAVFAC in support of this proposition, do not preclude our Office from considering a protest from a bidder alleging that its bid has been arbitrarily rejected. Further, the Navy's decision to follow our recommendation is irrelevant in defining our authority to hear the matter, and, in any event, the Competition in Contracting Act of 1984 obligates agencies to consider our recommendation in good faith. This statutory requirement cannot be circumvented by NAVFAC's interpretation of a regulation. Contract Services Company, Inc., B-219430, supra.

Two of the alleged errors in the Navy's in-house cost calculations were raised by the protester for the first time in its submissions to our Office. These concern the cost of providing machine shop services, required under the IFB, but allegedly omitted by the Navy from its calculations under Line 3 of other specifically attributable government costs. Dyneteria estimates this cost as \$950,000. Similarly, under Line 3 Dyneteria asserts that the Navy failed to include the cost to the government for a support contract for solid waste disposal, required of the contractor under the IFB in the form of a small business set-aside subcontract. Dyneteria estimates this cost as \$450,000--the amount which it included in its bid.

We will not consider these arguments since the protester failed to raise them in its appeal to the contracting agency. Dyneteria, Inc., B-205487, June 1, 1982, 82-1 C.P.D. ¶ 506. Because the pertinent procurement regulation provides that an affected party may request a review of the government's calculations and requires the government to respond, FAR § 7.305 (FAC 84-21), we have held that we will not review a protest against a cost comparison unless the protester has exhausted this relatively speedy administrative remedy available with the contracting agency itself. JAC Management, Inc., 60 Comp. Gen. 372 (1981), 81-1 C.P.D. ¶ 274. Moreover, the regulation requires that any objections raised or appealed must be specific. We therefore will decline to review any objections to a cost comparison not specifically appealed to the contracting agency. World Maintenance Services, Inc., B-217536, May 14, 1985, 85-1 C.P.D. ¶ 540.

Dyneteria argues that under Line 8, contract administration costs are excessive because the Navy cost study is based on 13 full time employees (FTE) being needed to oversee contractor performance when only six FTE's are required. Dyneteria alleges this overstatement results in costs of \$848,590. Part IV, Ch. 3, Section 3 of the "Cost Comparison Handbook" specifically provides that the cost of contract administration is to be charged to the contractor's proposal and is to be based on the number of administrators shown in Table 3-1 of the Handbook. However, the Handbook also provides that the cost data shown in Table 3-1 are based upon a representative sample of agency's contract administration costs and that the actual number of administrators necessary for a particular contract may be higher or lower based upon the workload and specific circumstances of the function under study. The Handbook provides a mechanism by which the Table 3-1 limit may be waived and a higher number of administrators substituted.

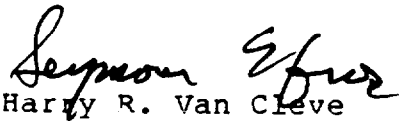
Here, Table 3-1 provides for only six FTE's for the work in question at the relevant 141 FTE in-house staffing level. However, the Navy administrative appeal concluded that the additional seven FTE's were appropriate because there was a properly granted waiver issued by the Chief of Naval Operations (CNO). Dyneteria concedes that a waiver letter was issued by the CNO, but points to warning language in the letter as evidence that the Navy has not shown that seven additional FTE's were necessary to provide contract administrative support. In fact, the April 2, 1986, waiver letter from the CNO explicitly provides that approval is granted to exceed the six FTE quality assurance manning requirement in the Circular. The Commanding Officer of the Pearl Harbor Navy Public Works Center requested authorization for 13 FTE's on the basis of the technical nature and criticality of the work in question, and the geographical dispersion of work sites over 50 percent of the area of Oahu. The CNO's letter specifically approves this request and the "warning" language, in relevant part, requires on-site validation of the requested staffing levels during the review of the cost comparison, which was conducted by the Navy. The language does not support Dyneteria's position that the waiver is invalid.

We have explicitly held that where the contracting activity received a waiver of the contract administrator limit from the proper authority, the protester's disagreement with contracting officials over the number of administrators necessary to assure contract performance provides no basis for our

Office to overturn the appeal board's finding that the waiver was valid. Trend Western Technical Corp., B-221352, supra, aff'd on reconsideration, Trend Western Technical Corp.--Request for Reconsideration, B-221352.2, supra.

To recapitulate, the Navy determined that in-house performance would cost \$1,509,803 less than contracting out, but on appeal allowed \$68,150 of the cost adjustments claimed by Dyneteria, resulting in a net cost differential of \$1,441,653. In its protest, Dyneteria has taken exception to Navy cost calculations amounting to an additional total of \$3,449,989. The issues discussed above dispose of a total of \$2,248,590 of the alleged mistakes in Navy cost comparison calculations. The remaining errors alleged by Dyneteria constitute \$1,201,039, which is less than the \$1,441,653 which the Navy determined would be saved by in-house performance. Since the difference remaining between the Navy's and Dyneteria's total performance cost figures is greater than the alleged errors, even if we resolved all of the other issues in Dyneteria's favor, it would not affect the evaluation result. Therefore, we will not address these other issues. Dwain Fletcher Co., B-219580, supra; EC Services Co., B-218202, May 23, 1985, 85-1 C.P.D. ¶ 594.

The protest is denied.

for 
Harry R. Van Cleve
General Counsel